

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term 2004

4 Argued: February 1, 2005

Decided: June 24, 2005)

5 Docket No. 04-3607-cr

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7 UNITED STATES OF AMERICA,
8 Appellee,

9 v.

10 WILLIAM BYRD, also known as Boo Bird,
11 also known as Boo,
12 Appellant.

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14 Before: WALKER, Chief Judge, CARDAMONE, Circuit Judge, and OWEN,
15 District Judge.*

16 AFFIRMED AND REMANDED.

17 Robert N. Convissar, Cohen & Lombardo, P.C.,
18 Buffalo, NY, for Defendant-Appellant.

19 James P. Kennedy, Assistant United States
20 Attorney (Michael A. Battle, United States
21 Attorney for the Western District of New York,
22 on the brief), Buffalo NY, for Appellee.

23
24 PER CURIAM:

25 Defendant-appellant William Byrd appeals from a judgment
26 entered on May 16, 2004, in the United States District Court for the
27 Western District of New York (Richard J. Arcara, Chief Judge),
28 convicting him, following his guilty plea, of conspiring to possess
29 with intent to distribute 50 grams or more of cocaine base and a

* The Honorable Richard Owen, United States District Judge
for the Southern District of New York, sitting by designation.

1 quantity of cocaine in violation of 21 U.S.C. § 846, and sentencing him
2 principally to a term of imprisonment of 300 months.

3 Byrd's plea agreement required that he "provid[e] complete
4 and truthful information regarding [his] knowledge of any and all
5 criminal activity, whether undertaken by [himself] or others, in any
6 way involving or related to the unlawful possession, manufacture or
7 distribution of controlled substances." It also permitted the
8 government to petition to be relieved of its obligations if the
9 defendant breached the agreement. The plea agreement envisioned a
10 Sentencing Guidelines Range of 135 to 168 months with the possibility
11 of going even lower. However, before sentencing, the government moved
12 to be relieved of its obligations under the plea agreement. The Court
13 held a hearing and heard six witnesses and concluded that, by a
14 preponderance of the evidence, Byrd, in violation of the express terms
15 of the agreement, lied to the government about his drug trafficking
16 relationship with David Williams and Daawood Naseer. Sufficient
17 evidence was set forth showing that Williams gave \$100,000 to Byrd to
18 purchase narcotics and that Byrd provided drugs to Naseer.

19 The district court having so concluded, relieved the
20 government of its obligations under the plea agreement. Byrd contends
21 this was error. "In general, plea agreements are subject to ordinary
22 contract law principles, except that any ambiguity is resolved strictly
23 against the government." United States v. Cimino, 381 F.3d 124, 127
24 (2d Cir. 2004) (internal quotation marks omitted). When the defendant
25 is the party in breach, the government is entitled to specific

1 performance of the plea agreement or to be relieved of its obligations
2 under it. Id. at 127-28. We conclude that the district court did not
3 err in finding that Byrd breached the plea agreement and in relieving
4 the government of its obligations thereunder.

5 The district court properly applied a preponderance of the
6 evidence standard in determining whether or not Byrd breached the plea
7 agreement. See United States v. Alexander, 901 F.2d 272, 273 (2d Cir.
8 1990) (per curiam) (affirming district court's application of
9 preponderance of the evidence standard to determination of whether
10 there was a breach of the plea agreement). Although United States v.
11 Booker held that "[a]ny fact (other than a prior conviction) which is
12 necessary to support a sentence exceeding the maximum authorized by the
13 facts established by a plea of guilty or a jury verdict must be
14 admitted by the defendant or proved to a jury beyond reasonable doubt,"
15 125 S. Ct. 738, 756 (2005), it did not speak to nor, in our view,
16 affect the appropriate standard of proof applicable to a finding that
17 the defendant breached his plea agreement. Such a finding was before
18 Booker, and remains after Booker, within the province of the sentencing
19 judge subject to a preponderance of the evidence standard.

20 Because this appeal was pending on direct review when Booker
21 was handed down, we exercise our discretion to not reach the specific
22 sentencing challenges Byrd raises on appeal. In light of Booker and
23 this Court's decision in United States v. Crosby, 397 F.3d 103 (2d Cir.
24 2005), this case is remanded to the district court for further
25 proceedings in conformity with Crosby. Any appeal taken from the

1 district court's decision on remand can be initiated only by filing a
2 new notice of appeal. See Fed. R. App. P. 3, 4(b). A party will not
3 waive or forfeit any appropriate argument on remand or on any appeal
4 post-remand by not filing a petition for rehearing of this remand
5 order.

6 Accordingly, and for the foregoing reasons, the judgment of
7 the district court is hereby AFFIRMED in part and REMANDED in part.